IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

TUESDAY, THE 20TH NOVEMBER 2007 / 29TH KARTHIKA 1929

CRP.No. 500 of 2005(E)

AGAINST THE ORDER IN IA 3566/05 IN AS.200/2004 of V ADDL. DISTRICT COURT, ERNAKULAM IN OS.1348/2003 of I ADDL.MUNSIFF'S COURT, ERNAKULAM

REVN. PETITIONER: RESPONDENTS/RESPONDENTS/DEFENDANTS:
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1. THE CHOICE SCHOOL,
   REPRESENTED BY IT'S PRINCIPAL MOLY CYRIL,
   NADAMA POST, THRIPUNITHURA, ERNAKULAM-682 301.

2. MR.JOSE THOMAS, S/O. THOMAS,
   AGED 50 YEARS, CHAIRMAN, THE CHOICE SCHOOL,
   NADAMA POST, THRIPUNITHURA, ERNAKULAM-682 301.

BY ADV. SRI.C.A.MAJEED

RESPONDENT: PETITIONER/APPELLANT/PLAINTIFF:

M.P. SALIM, AGED 50 YEARS,
S/O. PRABHAKARAN, MULLAMANGALATHU HOUSE,
KUREEKADU P.O., THIRUVAMKULAM VIA., ERNAKULAM DIST

BY ADV. SRI.PEEYUS A.KOTTAM
SRI.K.C.BIJU
SRI.S.DILEEP (KALLAR)
SRI.KURIAN JOSEPH (ARAKKUNNAM)
SRI.NAVEEN THOMAS
SRI.M.M.PRASAD
SRI.P.JIMMY JOHN

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 20/11/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

I.A.NO.1359/2005 IN C.R.P.NO.500/2005

DISMISSED

20/11/2007 SD/- K.T.SANKARAN, JUDGE

//TRUE COPY//

AHZ/

K.T.SANKARAN J

C.R.P. No. 500 of 2005

Dated this the 20th day of November 2007

O R D E R

The respondent in this Civil Revision Petition filed O.S.No.1348 of 2003, on the file of the Court of the I Additional Munsiff of Ernakulam, for a declaration that the termination of the plaintiff from service in the first defendant School, as per letter dated 23.6.2003, is void and illegal and that the plaintiff is entitled to continue in the first defendant School as a Music Teacher on the same salary and service conditions which he was enjoying at the time of his termination, till the plaintiff's service is lawfully terminated in accordance with the Bye-laws made by the Central Board of Secondary Education. There was also a prayer for mandatory injunction, directing the defendants to reinstate the plaintiff in service as Music Teacher and to recover a sum of Rs.9,000/- per month as damages from the defendants from the date of suit till the plaintiff is reinstated in service.

2. The trial court decreed the suit in part as per the judgment and decree, dated 31.1.2004. The defendants had raised a contention that the suit was not maintainable. The trial court held under issue No.1 that the suit is maintainable. On the merits of the case, the trial court held that as per Rule 29(2) of the Affiliation Bye-laws, the defendants are entitled to

terminate the service of the plaintiff as per Ext.A2 termination order. All the requirements under Rule 29 were complied with. After analysing the evidence, the trial Court held that the defendants were adopting an unhealthy practice to cause termination of the services of the plaintiff. However, the trial court held that the defendants had not appointed any new teaching staff in the music department. A mandatory injunction was granted in favour of the plaintiff, directing the defendants that if the defendants wanted to fill up the post of Music Teacher, the plaintiff shall be appointed in the first defendant School. The prayer for declaration and damages were rejected by the trial court.

3. Challenging the judgment and decree of the trial court, the plaintiff filed A.S.No.200 of 2004, on the file of the Court of the V Additional District Judge, Ernakulam.

4. When the suit was filed, a representation submitted by the plaintiff before the Central Board of Secondary Education complaining about his illegal termination from service was pending. But the plaintiff did not mention the same in the plaint. Even at the time of evidence, the pendency of the matter before the Central Board of Secondary Education was not brought to the notice of the civil court. After disposal of the suit on 31.1.2004, the Central Board of Secondary Education passed an

order, dated 23.2.2004, in favour of the plaintiff Teacher, after finding that his termination from service was bad, illegal and arbitrary. The Central Board of Secondary Education also held that the order of termination is null and void. The management of the School was directed to follow the provisions of the Affiliation Bye-laws in letter and spirit.

5. After the order was passed by the Central Board of Secondary Education, the plaintiff filed I.A.No.3566 of 2004 in A.S.No.200 of 2004, seeking permission to withdraw the suit. The prayer was objected to by the defendants, who were respondents in the appeal. The court below allowed the application by the order impugned in this Revision.

6. Learned counsel for the petitioner submitted that the court below was not justified in permitting the suit to be withdrawn as rights have already accrued in favour of the defendants in the suit. The counsel submits that the plaintiff having not approached the court with clean hands and having suppressed material facts, he cannot be permitted to withdraw the suit and get rid off the findings rendered by the trial court against him. The counsel relied on the decisions in **K.S.Bhoopathy and others** v. **Kokila and others** **(AIR 2000 SC 2132**) and in **Neelakanta Pillai** v. **Madhava Kurup** (**2007 (2) KLT 340**). The counsel for the petitioner also submits that against the order passed by the Central Board

of Secondary Education, the revision petitioner has filed a petition for review on 23.3.2004 and the review petition is pending.

7. Learned counsel for the respondent contended that the proper authority to decide the question of reinstatement and the validity or otherwise of the order of termination from service is the Central Board of Secondary Education and the respondent had approached that authority. He also submitted that the respondent approached the civil court with several prayers including a prayer for declaration that the termination of his service was illegal and also for realisation of damages. He submitted that the civil court had no jurisdiction to direct reinstatement of the plaintiff in service as a contract for personal service could not be specifically enforced by the civil court. The submission is that there was a formal defect in the suit and that the suit must fail by reason of such formal defect. It is also submitted that there are sufficient grounds for allowing the plaintiff to withdraw from the suit.

8. Order XXIII Rule 1 of the Code of Civil Procedure deals with withdrawal of suit or abandonment of part of claim. Rule 1 reads as follows:

> "**1. Withdrawal of suit or abandonment of part of claim**:- (1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied,-

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, if may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff -

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs."

As per sub-rule (1) of Rule 1, the plaintiff may abandon his suit or abandon a part of his claim. Sub-rule (3) of Rule 1 provides for granting permission to the plaintiff to withdraw from the suit with liberty to institute a fresh suit in respect of the subject matter of such suit or part of the claim. In order to attract sub-rule (3), either of the following two ingredients must be satisfied. (i) that a suit must fail by reason of some formal defect; or (ii) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of the suit or part of the claim. If any of these conditions are satisfied, the court may grant permission to the plaintiff to withdraw from the suit with liberty to institute a fresh suit. Rule 2 to Order XXIII of the Code of Civil Procedure provides that in any fresh suit instituted on permission granted under Rule 1, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.

9. Rule 1 of Order XXIII postulates abandonment of suit as well as withdrawal of the suit with permission of the Court to institute a fresh suit. For abandoning a suit, the Rule does not contemplate that permission of the Court is necessary. If a suit is to be abandoned as provided in sub-rule (1) of Rule 1 of Order XXIII, there is no question of granting permission to institute a fresh suit. Abandonment is the complete relinquishment of the right of the plaintiff to continue to prosecute the suit.

When the plaintiff does not wish to prosecute the suit, he is free to abandon the suit. In such cases, the Court cannot grant permission to institute a fresh suit. On the other hand, if the court is satisfied that any of the two ingredients of the sub-rule (3) of Rule 1 is attracted and the plaintiff wants to withdraw from the suit , the court may grant permission to withdraw the suit with liberty to institute a fresh suit in respect of the subject matter of the suit. For abandoning the suit, the plaintiff need not establish the ingredients as provided in sub-rule (3).

10. For abandoning a suit at the trial stage, permission of the court may not be necessary, since sub-rule (1) of Order XXIII Rule 1 does not insist on any such permission to be granted. But when it comes to the question of withdrawal of the suit with liberty to institute a fresh suit, permission of the court is absolutely necessary. An appeal being a continuation of the suit, Courts have taken the view that Rule 1 of Order XXIII applies to appeals as well. (See **Amminikutty** v. **George Abraham** (1987 (1) KLT 574)). The question is when a defeated plaintiff, who has filed an appeal, wants to abandon the suit, should he get the permission of the Appellate Court to do so. The appellant/plaintiff in such case could very well abandon his appeal by not prosecuting the appeal, for which permission of the Court is not necessary. The result would be dismissal of the appeal and the consequence thereof would be confirmation of the decree passed by the trial court. But if the

appellant/plaintiff wants to efface the judgment and decree rendered by the trial court by abandoning the suit at the appellate stage, I do not think that any such right is vested in the plaintiff/appellant. Necessarily, he has to apply for leave of the Court to abandon the suit at the appellate stage. Though sub-rule (1) of Rule 1 Order XXIII of the Code of Civil Procedure does not speak of any permission being granted for abandoning the suit, it is to be noted that that is with reference to abandonment of the suit at the trial stage.

11. In K.S.Bhoopathy's case (**AIR 2000 SC 2132**), the Supreme Court laid down the principles with regard to the withdrawal from suit with permission to institute a fresh suit and held that the grant of leave envisaged in sub-rule (3) of Order XXIII Rule 1 is at the discretion of the Court and that the discretion is to be exercised by the Court with caution and circumspection. Seeking permission to withdraw from the suit at the appellate stage was considered by the Supreme Court in *K.S.Bhoopathy's* case and it was held thus:

> ".. The court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action. This becomes all the more important in a case where the application under O.XXIII R.1 is filed by the plaintiff at the stage of appeal. Grant of leave in such a case would result in the unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on a clean slate. It may also

result in the contesting defendant losing the advantage of adjudication of the dispute by the court or courts below. Grant of permission for withdrawal of a suit with leave to file a fresh suit may also result in annulment of a right vested in the defendant or even a third party. The appellate/second appellate court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in O.XXIII R.1(3) CPC for exercise of the discretionary power in permitting the withdrawal of the suit with leave to file a fresh suit on the same cause of action. Yet another reason in support of this view is that withdrawal of a suit at the appellate/second appellate stage results in wastage of public time of courts which is of considerable importance in the present time in view of large accumulation of cases in lower courts and inordinate delay in disposal of the cases."

12. In **M/s.Hulas Rani Baij Nath** v. **Firm K.B.Bass and Co.** (**AIR 1968 SC 111),** the Supreme Court considered the question whether the plaintiff could withdraw from the suit when issues had been framed and some evidence had been recorded, but no preliminary decree for rendition of accounts had yet been passed. It was held as follows:

"... The language of Order 23, Rule 1, sub-rule (1), C.P.C., gives an unqualified right to a plaintiff to withdraw from a suit and if no permission to file a fresh suit is sought under sub-rule (2) of that Rule, the plaintiff becomes liable for such costs as the Court may award and becomes precluded from instituting any fresh suit in respect of that subject-matter under sub-Rule (3) of that Rule. There is no provision in the Code of Civil Procedure which requires the Court to refuse permission to withdraw the suit in such circumstances and to compel the plaintiff to proceed with it. It is, of course, possible that different considerations may arise where a set-off may have been claimed under Order 8, C.P.C or a counter-claim may have been filed, if permissible by the procedural law applicable to the proceedings governing the suit...."

13. In **Sarguja Transport Service** v. **State Transport Appellate Tribunal, Gwalior and others** (**AIR 1987 SC 88**), the Supreme Court considered the distinction between abandonment and withdrawal under sub-rules (1) and (3) of Order XXIII Rule 1 of the Code of Civil Procedure. To quote:

> "7. The Code as it now stands thus makes a distinction between 'abandonment' of a suit and 'withdrawal' from a suit with permission to file a fresh suit. It provides that where the plaintiff abandons a suit or withdraws from a suit without the permission referred to in sub-rule (3) of R.1 of O.XXIII of the code, he shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim. The principle underlying R.1 of O.XXIII of the Code is that when a plaintiff once institutes a suit in a Court and thereby avails of a remedy given to him under law, he cannot be permitted to institute a fresh suit in respect of the same subject-matter again after abandoning the earlier suit or by withdrawing it without the permission of the Court to file fresh suit. Invito beneficium non datur. The law confers upon a man no rights or benefits which he does not desire. Whoever waives, abandons or disclaims a right will lose it. In order to prevent a litigant from abusing the process of the Court by instituting suits again and again on the same cause of action without any good reason the Code insists that he should obtain the permission of the court to file a fresh suit after establishing either of the two grounds mentioned in sub-rule (3) of R.1 of O.XXIII. ...."

14. In **R.Ramamurthi Aiyar (dead) by L.Rs**. v. **Raja V.Rajeswararao** (**AIR 1973 SC 643**), the plaintiff sought withdrawal of the suit after the defendant filed an application under Section 3 of the Partition Act. It was held that if any vested right comes into existence

before the prayer for withdrawal is made, the court is not bound to allow withdrawal. It was noticed that this could happen only in very limited circumstances. As soon as a shareholder applies for leave to buy at a valuation the share of the party asking for a sale under the provisions of the Partition Act, it was held that he obtains an advantage and the Court is bound thereafter to order a valuation and offer to sell the same to such shareholder at the valuation so made. If the plaintiff is allowed to withdraw the suit after the defendant has gained or acquired the advantage or the privilege of buying the share of the plaintiff in accordance with the provisions of Section 3(1) of the Partition Act, it would enable the plaintiff to defeat the purpose of Section 3(1) of the Partition Act and also to deprive the defendant of the option or privilege available to him.

15. In **The Executive Officer, Arthanareswarar Temple** v. **R.Sathyamoorthy and others** **(AIR 1999 SC 958**), the Supreme Court noticed various decisions of the High Courts and held that:

> "14. It is true that in a large number of cases decided by the High Courts, it was held while dealing with applications under Order 23, Rule 1, CPC, that if an appeal was preferred by an unsuccessful plaintiff against the judgment of the trial Court dismissing the suit and if the plaintiff appellant wanted to withdraw not only the appeal but also the suit unconditionally, then such a permission so far as the withdrawal of the suit was concerned, can be granted if there was no question of any adjudication on merits in favour of the defendants by the trial being nullified by such

withdrawal. On the other hand, if any such findings by the trial Court in favour of the defendant would get nullified, such permission for withdrawal of the suit should not be granted. (See Thakur Balaram Singh v. K.Achuta Rao, (1977) 2 APLJ (HC) 111; Kedar Nath v. Chandra Karan, AIR 1962 All 263; V.Dube v. Harcharan, AIR 1971 All 41; Charles Samuel v. Board of Trustees , (1978) 2 Mad L.J.243, Lala Chetram v. Krishnamoni, (1984) 1 Mad LJ 28; Jubedan Begum v. Sekhawat Ali Khan, AIR 1984 Punj & Har 221; Ram Dhan v. Jagat Prasad, AIR 1982 Raj 235..."

16. In **R.Rathinavel Chettiar and another** v. **V.Sivaraman and others** **((1999) 4 SCC 89**), the question considered was whether permission could be granted for withdrawal of the suit at the appellate stage, which would have the effect of destroying or nullifying the decree affecting thereby the rights of parties which came to be vested under the decree. It was held that:

"22. In view of the above discussion, it comes out that where a decree passed by the trial court is challenged in appeal, it would not be open to the plaintiff, at that stage, to withdraw the suit so as to destroy that decree. The rights which have come to be vested in the parties to the suit under the decree cannot be taken away by withdrawal of the suit at that stage unless very strong reasons are shown that the withdrawal would not affect or prejudice anybody's vested rights..."

17. In the present case, it cannot be said that the defendants have acquired any vested right by the dismissal of the suit. The trial court had held that Rule 29(2) of the Affiliation Bye-laws were complied with by the defendants. At the same time, the trial court had also held that the

defendants adopted an unhealthy practice in terminating the services of the plaintiff. The relevant conclusions read as follows:

> ".. On analysing the entire evidence on record even though defendants complied all requirements contemplated under Rule 29 of Affiliation Bye-laws issued by CBSE, the defendants are adopting unhealthy practice to cause the termination of the plaintiff from defendants school. It has come out in evidence that this is an unprincipled method adopted by the defendants..."

The trial court had also granted a mandatory injunction in favour of the plaintiff. In the facts and circumstances of the case, it cannot be said that a vested right accrued to the defendants and that there was a final and conclusive adjudication of all the disputes arising between the parties in respect of the termination of the services of the plaintiff. As rightly noticed by the court below in the impugned order, the question of reinstatement was outside the purview of suit and the appropriate authority was the Central Board of Secondary Education. The plaintiff having approached the Central Board of Secondary Education and the Board having passed an order in his favour, it cannot be said that abandonment of the suit at the appellate stage would cause any prejudice to the defendants. The contentions raised by the defendants before the Board on the basis of the civil court's judgment did not yield positive results and in spite of the findings rendered by the civil court, the Board granted relief to the plaintiff. I am of the view that granting permission to abandon the suit at the appellate stage would not cause prejudice to the defendants and

would not affect any of their vested rights.

18. In the present case, though the plaintiff used the expression "withdrawal from the suit" in the application filed by him, he has not sought for permission of the Court to institute another case. On the other hand, a reading of the application would make it clear that he is not inviting any decision from the civil court and that he is satisfied with the remedy before the Central Board of Secondary Education. Though the word "withdrawal" is used in the application, the actual relief sought for is abandonment of the suit. The lower appellate court has also adverted to this aspect and has stated in the order that the withdrawal sought for is without seeking leave of the Court to file a fresh suit.

19. The lower appellate court exercised the discretion in favour of the plaintiff and granted the relief sought for in I.A.No.3566 of 2004. The court below has considered the relevant aspects and thought it fit to grant permission to the plaintiff to abandon the suit though the court below has used the expression "withdrawal from the suit".

20. I would not have interfered with the discretion exercised by the court below for granting permission to abandon the suit without imposing any condition, but for the fact that the plaintiff all throughout the

proceedings in the trial court did not disclose the true facts before Court. Pendency of the application before the Central Board of Secondary Education was suppressed by the plaintiff. He was fully aware that his real remedy lies not before the civil court, but before the Board. Had he disclosed the pendency of the matter before the Board and sought for certain other reliefs, which could not be granted by the Board, but only by the civil court, the position would have been different. The trial court has not granted the main reliefs prayed for by the plaintiff but has granted only a mandatory injunction as indicated in paragraph 2 above. The Court could grant the mandatory injunction only when there was no effective alternative remedy. Evidently, the plaintiff had an alternative remedy and he had availed that remedy. Certainly, he should have disclosed that fact before the civil court. But, he did not do so. Therefore, I am of the view that permission to abandon the suit could be granted in this case only on heavy terms. The defendants were compelled to contest the matter before the trial court and for quite some time before the Appellate Court. They must be adequately compensated. Taking into account the facts and circumstances of the case, I am of the view that the plaintiff can be granted permission to abandon the suit only on payment of a sum of Rs.5,000/- as costs to the respondents/defendants on or before 15.1.2008. If the plaintiff fails to pay the costs before the aforesaid date, the Civil Revision Petition will stand dismissed.

In the result, the Civil Revision Petition is partly allowed, the order impugned is modified by imposing a condition for allowing I.A. No. 3566 of 2004 that the respondent/ plaintiff shall pay to the petitioners/ defendants a sum of Rs.5,000/- as costs, on or before 15.1.2008.

(K.T.SANKARAN)
Judge

ahz/